

## Employment & Labour - Austria

Supreme Court rules on termination indemnity and old-age pensions

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November 30 2011

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In a recent decision<sup>(1)</sup> the Supreme Court clarified that the termination indemnity for commercial agents can be forfeited if an agent has terminated the agency contract for retirement reasons other than reaching the regular retirement age.

### Facts

Under Section 24 of the Act on Commercial Agents, commercial agents are entitled to receive a termination indemnity from the principal:

- if the agent has brought the principal new business or significantly increased existing business to the benefit of the principal; and
- if payment of such an indemnity is reasonable under the circumstances.

The indemnity can total up to one year's commission. The commercial agent forfeits that entitlement if, among other reasons, the agent unilaterally terminates the agency contract and the principal's conduct had not given rise to the termination, unless "a continuation of agent's activity [could] not be reasonably expected due to agent's age, ill health or physical disability" (Section 24(3) of the act).

In a case recently decided by the Supreme Court, it was critical whether termination by an agent would warrant an entitlement to a termination indemnity - the agent had given notice of termination because she was eligible to receive a specific type of federal retirement pension. At the time of the termination of the agency contract, the agent was 58 years old and therefore not yet entitled to a regular old-age pension (the statutory retirement age for women in Austria was then 60 years). Instead, she was entitled to a specific pension for early retirement based on her fully accrued insurance periods.

### Decision

The Supreme Court ruled that the entitlement to a termination indemnity under Section 24 of the act was not contingent upon a formal requirement to a state pension. However, the statutory language referring to 'age' makes it clear that an entitlement exists where continuation of the contractual relationship by the agent could not be reasonably expected from the principal and if continuation would be to the agent's detriment specifically because of his or her age. In its decision, and based on existing legislative materials, the court was clear that reaching the regular statutory retirement age would qualify as sufficient justification for termination of the agency agreement for reasons of age, regardless of the agent's good health, thereby maintaining the entitlement to the termination indemnity. However, with respect to any other type of, or entitlements to, statutory retirement pensions, and in the absence of any clear guidelines in the legislative materials, the court concluded that clarification is required in each individual case to determine whether the principal's expectation would be reasonable under the circumstances and, given the agent's advanced age, that the agent continued her activities in spite of an entitlement to an early retirement pension.

Factors to be considered in this assessment include:

- the scope of customer accounts serviced by the agent;
- the scope of the agent's territory; and
- any required business travel.

Since neither the district court nor the court of appeals had gathered sufficient

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information in this respect that was supported by clear evidence, the Supreme Court referred the matter back to the district court for further clarification.

## Comment

The decision is novel in that the Supreme Court has put the issue of an indemnity entitlement to a reasonable expectation test, regardless of an entitlement to a statutory retirement pension, unless the agent has reached the formal statutory retirement age. Agents would be well advised to consider the implications for their termination indemnity and principals have been granted yet another reason to avoid payment of the indemnity once an agent retires.

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## Endnotes

(1) OGH September 16 2011, 9 ObA 105/10x.

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